Supreme Court, U. S.
FILED
JUN 13 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1609

STATE OF INDIANA, PETITIONER,

versus

SCOTTSDALE MALL, RESPONDENT

BRIEF FOR THE STATE OF SOUTH CAROLINA, AS AMICUS CURIAE IN SUPPORT OF INDIANA'S PETITION FOR WRIT OF CERTIORARI

DANIEL R. McLEOD
Attorney General

MARVIN C. JONES
Assistant Attorney General

F. KIMBALL JOYNER, JR.
Assistant Attorney General
P. O. Box 191, Room 306-A
Columbia, South Carolina 29202.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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This brief is submitted pursuant to Rule 42(4) of the Rules of this Court by the State of South Carolina in support of the petition of the State of Indiana to obtain a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, entered on February 16, 1977.

INTEREST OF THE AMICUS CURIAE

The State of South Carolina is a sovereign State of the United States with a substantial interest in supporting Indiana's petition for a writ of *certiorari* in this matter. The basis of the decision of the Seventh Circuit operates adversely upon the sovereignty of the State, and upon the flexibility needed for the planning of federally assisted State highway programs.

The Court of Appeals held that actions of the State of Indiana in the advancement to construction of the east leg of a limited access by-pass of the South Bend-Elkhart metropolitan area constituted a "major federal action" requiring compliance with the National Environmental Policies Act, 42 U. S. C. § 4321, *et seq.* (hereinafter 'NEPA'), even though the project was completely removed from the federal funding program process, and all federal funds committed to the project were returned. Such a decision seriously restricts the well established sovereign right of the States to exercise eminent domain and to construct roadways in the interests of their respective citizens.

The right of a state to condemn property and construct public roads is not limited in time. A state may choose to program a highway in such a manner as to keep open its option to finance the project with federal funds. However, a state may also choose to reject or refuse to accept federal assistance for the project. For these reasons it is clear that a state cannot be barred by the failure of federal officials to conform to the requirement of federal law regarding qualification for federal assistance to state projects. This is because the state has a continuing option to forego federal assistance to any given state project and proceed with state funds only. Admittedly, in order to qualify for federal assistance the state project must qualify under applicable federal statutory law including the appropriate sections of NEPA. However, the remedy for noncompliance with these statutes is a withdrawal of the federal assistance, and not an injunction against the state which in the exercise of its sovereignty may choose to continue to construct the project with state funds.

Planning for highway construction in South Carolina is the responsibility of the Department of Highways and Public Transportation. The Department constructs highways from resources provided by the State and by the biannual Federal-Aid Highway Acts (codified at 23 U. S. C. § 101, *et seq.*). The nature of the legislative authorization-appropriation process, the inherent dependence of the Highway Trust Fund and the South Carolina State Highway Fund on excise tax revenues from the sale of highway use products, principally gasoline, rising costs of highway construction, and variations in local traffic demands make the highway construction planning process difficult at best. Highway planners must advance a sufficient number of projects in a manner to preserve the option for using federal assistance so that a reasonably balanced overall state construction program can be administered. The planning must also insure that the State has the opportunity to use all of the funds apportioned from the Highway Trust Fund. Therefore, it is critical that the State of South Carolina have adequate flexibility in the ultimate designation of projects to receive federal assistance.

For these reasons, South Carolina has a vital interest in seeking review of the lower court's decision construing the relationship between NEPA and the Federal-Aid Highway Act, which, if allowed to stand would effectively prevent the Indiana State Highway Commission from exercising its sovereign right to construct roadways. South Carolina and its Department of Highways and Public Transportation need to know with certainty at what point, if any, its sovereignty is ceded in exchange for federal assistance to state highway construction. In light of the present uncertainty and inconsistency in the Circuits with regard to this matter, effective planning by state highway department and departments of transportation has become unfeasible. It is essential to all of the states that the Supreme Court clearly define the extent to which the Congress has

imposed conditions on the receipt of federal aid for state highway construction.

QUESTION PRESENTED

Whether a state which has programmed a highway construction project in anticipation of advancing it with federal-aid, but has withdrawn the request for federal funding and refunded any money received, may properly be enjoined from constructing the project with state revenues until the completion of an environmental impact statement.

STATEMENT

The statement of the case by the State of Indiana at page 3 of its petition includes a full analysis of the background leading to the decisions of the District Court and of the Court of Appeals and for the sake of brevity we adopt that statement of the case.

REASONS FOR GRANTING THE WRIT

The decision below raises issues of great importance to the states. These include questions of statutory construction regarding the administration of the Federal-Aid Highway Act and the role of the National Environmental Policy Act in relation to this program, and the enormous repercussions of the interpretation of this relationship on the states attempting to implement the program. The holding of the Court below with respect to when a state highway project becomes a major federal action so that an environmental impact statement must be prepared is in direct conflict with holdings in other circuits. It is our position that state projects receiving federal assistance cannot become 'federal' projects; and thus as state projects, they may not be enjoined for failure to comply with obligations imposed upon the federal government. Since NEPA applies only to federal agencies, the remedy for failure of federal officials

to prepare a proper environmental impact statement (hereinafter 'EIS') with regard to a federally assisted project is the withdrawal of federal funds and not an injunction against the state from completing the highway solely as a state project. This very controversial issue has become more confused rather than clarified by the cases considering the subject.

A. There is a conflict among the circuits as to when a project becomes 'federal' so as to be irrevocably subject to the NEPA.

While it is our contention that construction of a state-federal-aid highway can never become a federal project, discussed *infra*, over several years certain Courts of Appeals have found that at varying phases in the advancement of a project, it can become irrevocably federal.

These courts have developed a theory that at some point in the evolution of a highway project it became 'federal' and the obligations of federal assistance attached whether or not a state chose to continue to accept federal assistance. Probably the first of these cases was *Northeast Area Welfare Rights v. Volpe*, 2 ERC 1704 (E.D. Wash. 1971). This case held that a project did not become 'federal' until there were federal funds actually committed. Later cases disagreed sharply as to when a project became 'federal'. The Court in *La Raza Unida v. Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971), *aff'd*, 488 F. 2d 559 (9th Cir.), *cert. den.*, 409 U. S. 890 (1972), departed from the *Northeast Area Welfare Rights* view and decided that a project became federal at the time of location approval. *Cf. Sierra Club v. Volpe*, 351 F. Supp. 1002 (N.D. Cal. 1972). In *James River & Kanawha Canal Parks v. Richmond Metropolitan Authority*, 359 F. Supp. 611 (E.D. Va.), *aff'd*, 481 F. 2d 1280 (4th Cir. 1973), the Court held that although a highway project might become 'federal' early in the plan-

ning process, some federal participation must have taken place. Indeed, in *Arlington Coalition on Transp. v. Volpe*, 458 F. 2d 1323 (4th Cir.), *cert. den.*, 409 U. S. 1000 (1972), the Fourth Circuit retained jurisdiction over state defendants as a form of pendent jurisdiction in order to effectuate the remedy available against federal respondents.

The Second Circuit appears to have followed the theory that plans, survey, and estimate approval, followed by Federal Highway Administration funding authorization, is the point at which a proposed state highway project becomes irrevocably federal in nature. *Monroe County Conservation Council v. Volpe*, 472 F. 2d 693 (2nd Cir. 1972); *Citizens For a Balanced Environment v. Volpe*, 376 F. Supp. 806 (D. Conn.), *aff'd*, 503 F. (2d) 601 (2nd Cir. 1974), *cert. den.*, 423 U. S. 870 (1975).

In *Named Individual Members of San Antonio Conservation Soc'y v. Texas Hwy. Dept.*, 446 F. 2d 1013 (5th Cir. 1971), *cert. den.*, 406 U. S. 933 (1972), there was an indication from the defendant Texas Highway Department that it would build the project in issue using State funds exclusively. The Court would not allow such a procedure. "The North Expressway is now a federal project, and it has been a federal project since the Secretary of Transportation authorized federal participation in the project on August 13, 1970. As such, the North Expressway is subject to the laws of Congress, and the State, as partner in the construction of the project, is bound by those laws." *Id.* at 1207.

The decision of the lower Court in this case is indicative of the uncertainty regarding events which make a state highway project 'federal'. Seeming to express approval of the 'location approval' theory, the Court fails to say exactly why the project in the instant case is a major federal action. It cites a history of federal-state involvement in the project and preliminary financial benefits which "imbued the highway project with a federal character". However, other courts have recognized that the use of limited federal funding during the planning and design stage of a highway project does not constitute 'major federal action' under the NEPA. *Hawthorne Environmental Preservation Ass'n v. Coleman*, 417 F. Supp. 1091 (D. Ga. 1976); *Citizens for Balanced Environment v. Volpe, supra; James River & Kanawha Canal Parks v. Richmond Metropolitan Authority, supra.*

More important, in this case the Court does not have before it the agency administering the federal-aid highway program, the Federal Highway Administration. Thus, the language of the NEPA requiring "all agencies of the Federal government" to prepare an EIS for "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332 can only mean that the State of Indiana operating through its State Highway Commission has become an agency of the Federal government for purposes of NEPA.

It is apparent that there is a degree of conflict in the circuits as to the time when federally assisted state highway construction projects become irrevocably federal in character. We argue, *infra*, that under the present statutory scheme federal assistance can never so impose itself on a state highway construction project as to constitute a waiver by the state of its sovereign right to exercise eminent domain and construct roads using funds generated solely by the state. However, if we are wrong, it is imperative that the states know with clarity those acts by which it cedes its authority over highway construction within its own border, using its own funds.

For fiscal year 1977 almost six and one-half billion dollars were authorized to be apportioned from the Highway Trust Fund. Pub. L. No. 94-280, 90 Stat. 425 (May 5,

1976). South Carolina was apportioned almost sixty-two million dollars as its share. Thus, the issue is important both in terms of resolving a difficult issue of federal-state relationship and in terms of the amount of money involved.

B. **The enactment of 23 U.S.C. § 145 is a matter of great importance in the states and in light of the existing conflict in the circuits with regard to the effect of NEPA on state highway projects, this Court should rule on the application of the statute at the earliest practical time.**

It is apparent from the Federal-Aid Highway Act, 23 U.S.C. § 101, *et seq.*, that the interest of the federal government in the construction of a state highway arises only when the state elects to accept federal assistance. It is also obvious that there is no bar within the Federal-Aid Highway Act to a state from declining federal assistance to a project even though it may have originally been programmed for federal assistance. Additionally, overlooking NEPA for the moment, after such a refusal of federal assistance, there would appear to be no obligation on the state to abide by standards established for federal-aid highways.[1]

Congress enacted 23 U.S.C. § 145[2] to ensure that the states would retain the right to decide which projects would be federally assisted. No doubt it was enacted in response to a line of cases reviewed *supra*, which held that at some point state projects receiving federal assistance would become 'federal'. Section 145 provides:

> The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted State program.

[1] For example, 23 U.S.C. § 109 authorizes the Secretary of Transportation to adopt geometric and construction standards which must be met before the approval of plans and specifications may be granted. However, if federal assistance were declined, the highway could be constructed to dissimilar state standards.

[2] Pub. L. 93-87 § 133(a), 87 Stat. 261 (1973).

The section clarifies the fact that state programs do not become federal programs. Federal assistance to state highway construction provides "for a federally assisted State program." Additionally, neither the authorization nor the appropriation of Federal funds nor their availability for expenditure may in any way infringe on the "sovereign rights of the States to determine which projects shall be federally financed". It also follows that the statute recognizes the sovereign right of the States to determine which projects shall not be federally financed.

By its own terms, the NEPA requirement for preparation of an EIS does not apply to state highway construction but is imposed on federal agencies for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332. Thus, an EIS must be prepared by *federal agencies* for major *federal actions*. That the statute could be applied to the State of Indiana at all distorts its terms beyond recognition; that the statute could have any application at all when there is no federal agency before the Court below is simply incredible. To retain eligibility for federal assistance the states must comply with federal requirements from the earliest planning stages. Yet this very compliance, at a time too early to decide whether federal assistance will be necessary for a project, has been cited as the basis for holding a state project a federal one. Any number of factors can affect a highway department's decision to accept or forego federal assistance on a particular project. The process is a lengthy one, involving years of planning, and the amount of federal funds available to a particular state for highway assistance varies from year to year. It is also true that EIS standards

themselves change. Under existing law, the states have a continuing option to withdraw requests for federal funding in order to exercise effectively their sovereign right to decide which projects shall be federally assisted. While it is true that the federal government is not free to grant federal funds to states whose procedures do not accord with statutory and regulatory guidelines, the inescapable principle to which the courts have occasionally lost sight is that the states are constitutionally free to operate their own highway systems, *State of Nebraska v. Tiemann*, 510 F. 2d 446 (8th Cir. 1975), which includes the right to decline federal assistance and build a state highway with state funds.

This Court should decide whether responsible state officials may exercise their judgment that the requirements of the federal-aid highway program, when judged against essentially local interests and priorities, make federal assistance no longer desirable, and that federal aid should be relinquished and the road constructed by the state, exercising sovereign state powers using state generated resources.

CONCLUSION

For all the reasons set forth above, the State of South Carolina respectfully requests that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the 7th Circuit, entered in these proceedings on the 16th day of February, 1977, to resolve a serious issue of the impairment of the sovereign powers of the State and an issue of federalism that is of grave importance to the State.

Respectfully submitted,

DANIEL R. McLEOD
Attorney General

MARVIN C. JONES
Assistant Attorney General

F. KIMBALL JOYNER, JR.
Assistant Attorney General
P. O. Box 191, Room 306-A
Columbia, South Carolina 29202.